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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-220

COMMONWEALTH OF KENTUCKY, *ex rel.* ED W. HANCOCK, Attorney General, *Petitioner,*

vs.

RUSSELL E. TRAIN, Administrator, ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Brief of the California Attorney General, California Air Resources Board and Georgia Attorney General as Amici Curiae in Support of Petitioner.

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Brief of the California Attorney General, California Air Resources Board and Georgia Attorney General as Amici Curiae in Support of Petitioner.

Interest of Amicus Curiae, State of California.

The interest of the State of California in this litigation is to seek legal clarification and assurance that state and local air pollution control agencies have permit authority over the numerous stationary sources of air pollution operated by the federal government in California.

In California, the primary responsibility for the control of air pollution from stationary sources lies with local and regional air pollution control districts. Cali-

fornia Health and Safety Code Section 39012. These authorities have been granted broad powers by the Legislature to "make and enforce all needful orders, rules and regulations necessary or proper for the administration of the district . . ." and to reduce air pollution. Health and Safety Code Section 24260. Air pollution control districts have specific authority to require owners and operators of stationary air pollution sources to obtain permits from the district prior to the construction or operation of such sources. Health and Safety Code Sections 24263, 24264. A major function of the permit requirement in California air pollution control law is to insure that the air pollution control authorities are provided with "such information, analyses, plans or specifications as will disclose the nature, extent, quantity, or degree of air contaminants which are or may be discharged by such sources[s]." Health and Safety Code Section 24269. This data in turn facilitates the air poilution control agency's related authority to condition the issuance of permits to operate or construct air pollution sources, on the provision of specified control equipment or, in the case of new sources, on changes in the plans or specifications so that the districts can comply with their directive to achieve and maintain both state and federal ambient air quality standards. Health and Safety Code Sections 24264, 39276.

California is particularly concerned that the Clean Air Act not be interpreted in a way that would exempt the numerous federal sources of air pollution from local

and regional permit requirements. The Clean Air Act imposes legal obligations on the state and local governments to clean up air pollution from *all* stationary sources in order to achieve and maintain national standards. The permit requirement is the fundamental implementation and enforcement tool available to local and regional air pollution control districts for complying with the federal requirements. California is, therefore, interested in legal assurances that its local, regional and state air pollution control strategies are not impaired by exemptions given to federal stationary sources from local and regional permit requirements.

Section 118 of the Clean Air Act Amendments of 1970, under review in this case, is virtually identical to Section 313 of the Water Pollution Control Act Amendments of 1972. California is, therefore, also interested in legal clarification and assurances that its permit program for implementing and enforcing the Water Pollution Control Act Amendments of 1972 applies equally to the numerous federal sources of water pollution in California.

California has already participated as amicus curiae in this case before the Sixth Circuit Court of Appeals (*sub nomine Kentucky v. Ruckelshaus*, 497 F.2d 1172 (6th Cir. 1974)), and in the similar cases of *State of Alabama v. Seeber*, 502 F.2d 1538 (5th Cir. 1974) and *California v. Stastny*, No. 72-2905 (9th Cir., appeal docketed November 6, 1972). California is also the plaintiff in *California v. EPA*, ... F.2d ....; 7 E.R.C. 1667 (9th Cir. 1975) which held that federal agencies

and enclaves in California and Washington are subject to state water pollution control permit requirements under Section 313 of the Water Pollution Control Act Amendments of 1972.

California and Georgia are familiar with the legal questions presented and are vitally interested in asserting their position that federal stationary sources of air pollution are required under Section 118 of the Clean Air Act Amendments of 1970 to comply with state and local permit requirements.

Summary of Argument.

Successive amendments to the Clean Air Act since the initial legislation in 1955 show that Congress has progressively subjected operators of federal facilities to federal, state and local pollution control authority. Section 118 adopted in the 1970 amendments clearly shows that Congress intended to further strengthen federal, state and local pollution control authority to include permit requirements over federal facilities. Respondents, by introducing a spurious substance-procedure dichotomy in the statutory term "requirements", are arguing that federal facilities are exempt from even *federal* permit requirements.

The plain statutory wording of Section 118 supports the view that "requirements" includes permit requirements. To argue otherwise is to exempt non-federal facilities as well as federal facilities from permit requirements, a result clearly inconsistent with the Clean Air Act. Reference to other sections in the Clean Air Act,

such as Section 116, and to the legislative history, supports a broad interpretation of "requirements" to include permit requirements.

State and local pollution control permit requirements are necessary elements in state pollution control plans. If states are to fulfill their federally mandated pollution control duties, operators of federal facilities must be subject to state and local permit requirements.

Neither the Supremacy Clause nor the doctrine of sovereign immunity insulate federal facilities from state and local permit requirements. Section 118 of the Clean Air Act, in itself, constitutes a waiver of sovereign immunity. The fact that permit requirements are approved by EPA in state implementation plans, makes those permit requirements binding on federal facilities.

The strong structural and terminological similarities between the Clean Air Act and the Water Pollution Control Act, especially with respect to provisions for controlling federal facilities, provides additional support for construing the term "requirements" as used in both Acts to include permit requirements.

ARGUMENT.

INTRODUCTION.

The single issue in this case is whether Section 118 of the Clean Air Act Amendments of 1970 ("Clean Air Act") (42 U.S.C. § 1857f) requires operators of federal facilities to comply fully with federally approved state plans for implementation, maintenance and enforcement of national ambient air quality standards or whether that section requires only that they comply with the substantive standards and limitations of such plans but not their permit provisions. The resolution of this issue turns on the meaning of the phrase "requirements respecting control and abatement of air pollution" as it is used in Section 118.

Section 110 of the Clean Air Act requires the states to prepare and submit to the EPA Administrator a plan for implementing, maintaining and enforcing the national ambient air quality standards throughout the state.

Section 110 requires also the EPA Administrator to approve state implementation plans if he determines that the plans contain the content requirements specified including:

> ". . . provisions for establishment and operation of appropriate devices, *methods, systems,* and *procedures* necessary to monitor, compile, analyze data on ambient air quality. . . ." Section 110(a)(2)(c); 42 U.S.C. § 1857c-5(a)(2)(C). (Emphasis added.)

Once approved, a state implementation plan achieves the status of a federal regulation [*Albama v. Seeber,* 502 F.2d 1238 (5th Cir. 1974)] which the Administrator has the power to enforce. [*Id.*; Sections 110(d) and 113(a)(1), 42 U.S.C. § 1857c-5(d) and § 1857 c-8(a)(1)].

Section 118 under review in this case provides that operators of federal facilities

> ". . . shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

Congress provided also in Section 118 that when the paramount interest of the United States so requires, the President may exempt federal facilities from compliance with such requirements. When Sections 110 and 118 are read together, it is apparent that Congress intended operators of federal facilities to comply with federally approved state implementation plans, unless exempted by the President.[1] The Sixth Circuit, however, has imposed a gloss on Section 118 the effect of which is to exempt operators of federal facilities from permit systems, procedures and requirements contained in approved state implementation plans. *Kentucky v. Ruckelshaus,* 497 F.2d 1172 (6th Cir. 1974). To reach its decision, the Sixth Circuit had to conclude that the term "requirements" as it is used in Section 118 means only substantive requirements as distinguished from procedural requirements. The Sixth Circuit, relying on a "strained reading" of the legislative history of Section 118,[2] reasoned that Congress clearly waived exclusive jurisdiction over federal facilities with respect to compliance with substantive clean air standards, but intended no waiver with respect to procedural requirements.

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[1]Clean Air Act Section 118; 42 U.S.C. § 1857f.

[2]*Alabama v. Seeber,* 502 F.2d 1238, 1246 (5th Cir. 1974).

Subsequently, the Fifth Circuit considered the same issue, rejected the reasoning of the Sixth Circuit as unpersuasive and held that operators of federal facilities must comply fully with state plans—including their permit or "procedural" provisions. *Alabama v. Seeber*, 502 F.2d 1238 (5th Cir. 1974). The Fifth Circuit relied on the scheme of the Act as a whole, the words of Section 118, and the Congressional purpose for enacting that section. The Fifth Circuit noted that the legislative history of Section 118 was somewhat ambiguous, and consequently declined to permit that history "to control the customary meaning of [the] words" of Section 118. *NLRB v. Plasterers Local Union No. 79*, 404 U.S. 116, 129 (1971); and *United States v. Dickerson*, 310 U.S. 554, 562 (1940).

More recently, the Ninth Circuit in a substantially similar case,[3] has held that operators of federal facilities must comply fully with state "requirements respecting control and abatement of [water] pollution"—including state permit or "procedural" requirements. Recognizing "the strong structural similarities between the Clean Air Act and the 1972 Water Pollution Control Act Amendments", the Ninth Circuit relied in part upon the reasoning of the Fifth Circuit in the *Seeber* case. In doing so, that Circuit implicitly rejected the reasoning if not the decision of the Sixth Circuit in the *Kentucky v. Ruckelshaus* case.

Amici Curiae concur with the Fifth and the Ninth Circuits. Clearly, by enacting Section 118, Congress to some extent intended to waive its exclusive legislative jurisdiction and require operators of federal facilities to

[3]*California v. EPA*, ... F.2d ....; 7 E.R.C. 1667 (9th Cir. 1975).

adhere to federally approved state implementation plans. Respondents do not dispute this. *Kentucky v. Ruckelshaus, supra,* at 1172; *Alabama v. Seeber, supra,* at 1246-47. Respondents dispute only the scope of this waiver. Accordingly, the issue is whether Congress intended to waive its exclusive jurisdiction with respect to "the enforcement mechanisms of federally approved state implementation plans." *Alabama v. Seeber, supra,* at 1247. Amici Curiae submit that the Clean Air Act's history and purpose, its general scheme and the words of Section 118 all show unequivocably that Congress intended that operators of federal facilities shall comply fully with federally approved state implementation plans, including the permit provisions of such plans.

I

Federal Facilities Must Comply With State and Local Permit Requirements for Controlling and Abating Air Pollution.

A. Successive Amendments to the Clean Air Act Show That Congress Has Increasingly Subjected Operators of Federal Facilities to Federal, State and Local Control Authority.

When Congress enacted the original version of the Clean Air Act in 1955,[4] it declared "the policy of Congress to preserve and protect the primary responsibilities and rights of the states and local governments in controlling air pollution." (1955 Act, section 1.) Congress amended the Clean Air Act in 1959,[5]

[4]Public Law 159; 69 Stat. 322 (July 14, 1955) ("1955 Act").

[5]Public Law 88-365; 73 Stat. 646 (September 22, 1959) ("1959 Act").

1963,[6] 1967,[7] and 1970,[8] each time reiterating the policy that the United States should support and assist states and local governments to fulfill their primary responsibility to control and abate air pollution. Additionally, by each successive amendment Congress established a more comprehensive national system within which state and local governments might more effectively perform their functions. In this connection, the successive amendments manifest Congress' increasing realization and ultimately its determination that to assure air quality, states must have authority sufficient to regulate all sources of air pollution within their borders, including sources from federal enclaves.

As enacted in 1955, the Clean Air Act made no reference to federal facilities; however, in 1959, Congress added Section 118 to require operators of federal facilities to "cooperate" with state and local air pollution control agencies "to the extent practicable and consistent with the interests of the United States and with available appropriations . . ." (1959 Act, § 118.)

In 1963, another amendment authorized the HEW Secretary to require operators of federal facilities to obtain (revocable) permits from him before discharging certain pollutants into the air. (1963 Act § 7(b).) The 1963 Act also required operators of federal facilities to provide the HEW Secretary with plans, specifications and other information deemed by HEW to be relevant to the issuance of permits. *Id.* These same provisions were retained in the 1967 Act. (1967 Act, § 111.)

[6]Public Law 88-206; 77 Stat. 392 (December 17, 1963) ("1963 Act").

[7]Public Law 90-148; 81 Stat. 485 (November 21, 1967) ("1967 Act").

[8]Public Law 91-604; 34 Stat. 1713 (December 31, 1970) ("Clean Air Act").

By the Clean Air Act Amendments of 1970, Congress substantially strengthened the Act. For the first time, Congress required the States to develop plans to attain air quality standards within a specific period of time. (Clean Air Act § 110; 42 U.S.C. § 1857c-5.) At the same time, Congress enacted the current Section 118. The legislative history of Section 118 shows that Congressional displeasure with the performance of federal facilities under the voluntary compliance provisions of Section 111 of the 1967 Act prompted Congress to strengthen that section to require operators of federal facilities to comply with federal, state and local regulations. *Alabama v. Seeber, supra,* 1244-45; S. Rep. No. 91-1196, 91st Congress 2d Sess., at 23 (1970). The new "get tough" attitude manifested by Congress in the 1970 Amendments (both with respect to the states and federal facilities) provides every indication that by enacting Section 118, Congress fully intended operators of federal facilities to comply unqualifiedly with federally approved state implementation plans.

A comparison of Section 111 of the 1967 Act with Section 118 of the 1970 Act shows this to be the case. The 1967 Act, Section 111(b), provided that under certain circumstances, the HEW Secretary could require operators of federal facilities to obtain permits and to provide the Secretary with pertinent data with

respect to such permits. There is every reason to believe that in adopting the current Section 118, Congress intended the EPA Administrator (the successor to the HEW Secretary) to continue to have this permit authority over federal facilities. However, the Administrator has this authority pursuant to Section 118 only if the term "requirements" as it is used in Section 118 encompasses procedural as well as substantive requirements. This becomes apparent when it is considered that Section 118 explicitly requires federal facilities to comply with *federal* (as well as state and local) requirements. Respondents' construction of Section 118, that the term "requirements" only means *substantive* requirements, yields the anomalous result that EPA itself is powerless to impose permit requirements on federal facilities under its preemptive authority over standards of performance for new sources (§ 111) and hazardous emissions (§ 112), or otherwise. Respondents' interpretation of Section 118 in effect argues that Congress intended, in the 1970 Amendments, to *weaken* the control provisions over federal facilities. In light of Congress' clear intent to strengthen the provisions of the former Section 111 (1967 Act), such an interpretation clearly is untenable.

B. Permit Requirements Are "Requirements Respecting Control and Abatement of Air Pollution" With Which Federal Facilities Must Comply.

Section 118 of the Clean Air Act expressly requires:

> "Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge of air pollutants, *shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements* . . ." 42 U.S.C. 1857f. (Emphasis added.)

Respondents urge that the term "requirements," as used in the section, encompasses "substantive" but not procedural requirements and therefore the section does not direct operators of federal facilities to comply with federal or state permit procedures promulgated under Section 110 of the Act. Neither the scheme of the Act nor the words of Section 118 provide any support for Respondents' interpretation. In fact, Respondents have raised a "semantical red herring." *Alabama v. Seeber, supra,* 1245.

Initially it should be recalled that Kentucky's air pollution control permit system at issue here has been approved by EPA as a part of Kentucky's Implementation Plan, required to be prepared and adopted by Section 110 of the Clean Air Act.

Section 110 clearly contemplates the use of state and local permit systems or requirements, as it *requires* state implementation plans to contain specified components including the following:

> 1. "Emission limitations, schedules and timetables for compliance with such limitations, *and such other measures as may be necessary* to insure attainment and maintenance . . . [of the national standards] . . ." 42 U.S.C. 1857c-5(a)(2)(B). (Emphasis added.)
>
> 2. A ". . . provision for establishment and operation of appropriate devices, *methods, systems*

and *procedures* necessary to (1) monitor, compile and *analyze* data on ambient air quality . . ." 42 U.S.C. 1857c-5(a)(2)(C). (Emphasis added.)

3. A "procedure" for pre-construction review of the location of new sources. Such "procedure" must provide for adequate legal authority to prevent construction if the new source would prevent attaining or maintaining the national standards in the air basin. The "procedure" must also require the owner or operator of the proposed new source to submit to the state such information as may be necessary to determine if the new source would prevent attainment or maintenance of the national standards. 42 U.S.C. 1857c-5(a)(2)(D).

4. Legal authority adequate to carry out the implementation plan. 42 U.S.C. 1857c-5(a)(2)(F)(i).

5. "Requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources." 42 U.S.C. 1857c-5(a)(2)(f)(ii).

The use of the words like "methods", "systems" and "procedures" in Section 110 certainly supports the use of permit requirements by state and local air pollution control agencies. The question is whether the permit requirements apply to operators of federal facilities.

Implicit in Respondents' argument is the recognition that non-federal facilities must comply with federal. state and local permit requirements (as well as standards and limitations) in "applicable implementation plans."

Yet the plain wording of Section 118 requires that federal facilities ". . . shall comply with Federal, State,

interstate and local requirements respecting control and abatement of air pollution *to the same extent that any person is subject to such requirements.*" Section 118; 42 U.S.C. § 1857f. (Emphasis added.) Since "any person," for example a steel mill, is subject to both procedural and substantive state and local air pollution control requirements, it follows necessarily that operators of federal facilities, "to the same extent as any person," are subject to *all* requirements contained in "applicable implementation plans"—not just the so-called substantive requirements. To conclude otherwise compels that the term "requirements," as applied to "any person," be interpreted differently from the same term as applied to operators of federal facilities. This is contrary to common sense as well as to accepted rules of construction.

Reference to Section 116 of the Clean Air Act also supports our conclusion that "requirements" as used in Section 118 includes permit requirements.

It is readily apparent that Congress distinguished between 1) standards and limitations and 2) requirements respecting control and abatement of air pollution in Section 116 of the Clean Air Act:

> ". . . nothing in this chapter shall preclude or deny any state or political subdivision thereof to adopt or enforce (1) *any standard or limitation* respecting emissions of air pollutants *or* (2) any *requirement respecting control and abatement of air pollution* . . ." (Emphasis added.) 42 U.S.C. § 1857d-1.

The use of the term "requirement" clearly is intended to mean something other than "standard" or "limitation." Just as clearly, "requirement" is a much broader term than either "standard" or "limitation," and in-

cludes permit systems and other measures necessary for enforcement of state implementation plans.

Although it is not necessary to go behind the clear meaning of the phrase "state and local requirements respecting the control and abatement of air pollution," the legislative history of Section 118 in particular, and the Clean Air Act generally, only add force to our conclusion that federal facilities are required to comply with permit requirements.

When framing the language of Section 118, both the House and Senate were sensitive to the recalcitrance and inaction by federal air polluters in the clean-up effort. "Instead of exercising leadership in eliminating air pollution, the federal government has tended to be slow in this respect." H.R. No. 91-1146, 91st Cong., 2d Sess.; *U.S. Code Cong. & Admin. News*, 5360 (1970). During floor debate on the amendments, Rep. William Springer, ranking minority member of the House Committee on Interstate and Foreign Commerce again stated the problem:

> "One of the frustrating aspects of air pollution legislation is the presence of large federal installations either operated directly by the Government or under its direction which contaminate the atmosphere on a large scale. How can we expect cooperation or credibility for the governmental effort when the installations controlled by Uncle Sam are some of the worst polluters? The Federal Government as much as some private business has dragged its feet for purely economic reasons. *Allowing the Government to remain immune from the rules which we impose on others is wrong. . . .*" 116 Cong. Rec. 19207 (1970). (Remarks of Rep. Springer.) (Emphasis added.)

The very brief, almost passing, discussion of Section 118 in the House-Senate Conference Report suggests that there were no significant congressional differences of opinion over the broad obligations imposed on federal facilities by Section 118.

The House-Senate conference report on Section 118 states in summary form:

> "The House bill and the Senate amendment declared that Federal departments and agencies should comply with applicable standards of air quality and emissions."[9]

One commentator has concluded that the legislative history of Sections 116 and 118 is only a summary and should not be taken as conclusive of the meaning of these provisions.

> "Read together the two sections and their legislative history suggest that:
>
> "1. The legislative history, being only a summary of the proposed law, should not be read too narrowly and should not be taken as conclusive of the meaning of the provisions; and
>
> "2. The phrase 'requirements respecting control and abatement of air pollution' was not intended to encompass merely emission standards but rather the whole gamut of control measures including operating permits."[10]

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[9]House-Senate Conference Committee Rep. No. 1783, 91st Cong. 2nd Sess.; *U.S. Code Cong. & Admin. News* 5381 (1970).

[10]Comment, *Local Control of Pollution from Federal Facilities*, 11 San Diego L. Rev. 972, 982-83 (1974); In *California v. E.P.A.*, ... F.2d ...., ...; 7 E.R.C. 1667, 1671 (9th Cir. 1975), the Ninth Circuit followed a similar analysis of the legis-

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Amici curiae submit therefore that the term "requirement," as used in Sections 118 and 116, should be interpreted as it is customarily used, to include matters of substance and procedure. Respondents' unordinary and strained interpretation should be rejected.

C. State and Local Permit Requirements Are Integral and Necessary Elements of Implementation Plans for Controlling Stationary Sources of Air Pollution, Including Federal Facilities.

Permit requirements have long been recognized as essential mechanisms for comprehensive implementation and enforcement of law. The Sixth Circuit's statement that "A permit has absolutely nothing to do with air quality" is patently erroneous.

The permit system, as Congress has recognized, is a *necessary* element of effective state implementation plans for controlling and abating air pollution. § 110 (a)(2)(C); 42 U.S.C. § 1857c-5(a)(2)(C).

Permit applications for authority to construct new sources provide essential data on the nature and volume of pollutants that the new source will emit. Permit applications also provide detailed information on the location and times when pollutants will be emitted. Permit applications also quickly disclose whether the new source will use the requisite or best available con-

lative history of section 313 of the Water Pollution Control Act, and concluded that the summary discussion of the term "requirements" in the committee reports should not be taken as dispositive of Congressional intent. The Ninth Circuit went on to hold that "requirements" in section 313 includes state *permit requirements* with which federal facilities must comply.

trol technology which are mandated by the Clean Air Act's strategy for controlling stationary sources. 42 U.S.C. § 1857c-5(e) and (f). If a proposed new source is not utilizing the requisite control technology, the permit requirement enables remedial action to be taken prior to construction thereby avoiding costly delays in enforcement or retro-fitting of the required technology. Permit requirements also facilitate monitoring of emissions by the air pollution control agency, and are an effective means for providing the agency with a comprehensive inventory of total emissions in the air basin. An up-to-date and comprehensive inventory of emissions in the air basin is essential to make decisions whether additional new sources should be allowed or whether variances should be granted without preventing achievement and maintenance of the national standards.

The burden on federal stationary sources imposed by state and local permit requirements is not substantial especially when it is conceded that the Clean Air Act *does* require federal facilities to comply with the timetable for achieving and maintaining the national standards. If federal facilities are exempted from permit requirements, however, there is no way to tell whether *all* the stationary sources in the air basin are reducing their emissions to achieve and maintain the national standards. Non-federal stationary sources, which do provide complete data through permit requests, thus may be put in the position of having to reduce their emissions more than is proportionately required to achieve and maintain the national standards. Propor-

tionate reduction and emissions from *all* stationary sources in an air basin cannot be effectively achieved if federal stationary sources are exempted from permit requirements.

Federal stationary sources often constitute a major contributor of pollution in a given air basin.[11] As a matter of practical necessity, therefore, the control strategy for the air basin must apply equally to federally operated and non-federal sources.

II

The Supremacy Clause and Sovereign Immunity Doctrine Do Not Insulate Federal Facilities From State and Local Permit Requirements.

A. The Supremacy Clause Is Inapplicable to Bar State Permit Requirements.

Section 118 unambiguously states that federal facilities "shall comply" with state "requirements respecting control and abatement of air pollution." Where Congress affirmatively declares that federal facilities or property is subject to state regulation, the Supremacy Clause (Art. VI, clause 2 of the United States Constitution) no longer insulates federal facilities from the specified kind of state regulation. *Mayo v. United States*, 319 U.S. 441, 446, 448 (1943).

Since it is our view that the term "requirements" in Sections 116 and 118 includes permit requrements, it necessarily follows that Section 118 meets the affirmative declaration test which this Court set out in *Mayo v. United States, supra,* at 448. The Supremacy Clause therefore cannot operate to prevent state and local air pollution control agencies from applying their permit

[11]S. Rep. No. 91-1196, 91st Cong., 2nd Sess. 37 (1970).

requirements to federal stationary sources of air pollution.

B. Federal Facilities Are Not Immune From State Suits Enforcing Section 118.

Amici curiae agree with the Fifth Circuit's succinct observation on the sovereign immunity argument in *Alabama v. Seeber, supra,* at 1248:

> "Little or no inference is required to conclude that section 118 embodies a waiver of sovereign immunity with respect to federal facilities."[12]

As we have previously pointed out, the Clean Air Act in Sections 111(c)(1), 112(d)(1) and 114(b)(1) specifically exempts certain federal facilities from state enforcement authority delegated by EPA pursuant to those sections. Section 110, which requires states to enforce "applicable implementation plans," however, contains no such exemptions for Federal facilities from state enforcement authority. If Congress had not intended to consent to suits against federal facilities over compliance with permit (or other) requirements it would have said so just as it did in Sections 111, 112 and 114. Both the plain wording in Section 118 and Section 110's failure to exempt federal facilities from state implementation plan requirements demonstrate that sovereign immunity from state enforcement of permit regulations has been waived.

[12]Additional authorities concluding that Congress has waived sovereign immunity in Section 118 are Bolbach, *The Courts And The Clean Air Act*, Environmental Reporter, Monograph No. 19, page 25 (July 12, 1974) and *County of Milwaukee v. Veterans Administration Center,* 357 F.Supp. 192 (E.D. Wis., 1973).

C. State and Local Permit Requirements in Approved State Implementation Plans Are Binding on the Federal Government; Federal Stationary Sources Must Comply With Such Permit Requirements.

As we have already indicated, emission reduction measures and other "requirements respecting control and abatement of air pollution" are the heart of implementation plans. Whether such regulations and requirements are adopted by the states and approved by EPA or, alternatively, promulgated by EPA when a state fails to submit an approvable plan or portion of a plan, these regulations and requirements constitute an "applicable implementation plan" and become federal law on approval. Sections 110(d) and 113(a)(1); 42 U.S.C. Sections 1857c-5(d) and 1857c-8(a)(1). *Appalachian Power Co. v. EPA*, 477 F.2d 495, 499 (10th Cir. 1973); *Alabama v. Seeber, supra,* 1248; Luneburg, *Federal-State Interaction Under The Clean Air Amendments of 1970,* 14 Boston Col. Ind. & Com. L.R. 637, 640 (1973).

Permit requirements, applicable to federal stationary sources as well as non-federal facilities, contained in approved state implementation plans thus achieve the status of federal law and are thereby binding on the federal government and federal stationary sources.

Congress clearly has the power to adopt as federal law the laws and regulations of a state. *United States v. Sharpnack*, 355 U.S. 286 (1958). Congressional legislation has often "borrowed" or adopted state laws and regulations in order to implement federal policies. *E.g.*, Federal Tort Claims Act, 28 U.S.C. section 1346(b); Federal Assimilative Crimes Act, 18 U.S.C. Section 13; Federal Coal Mine Safety Act, 30 U.S.C. Section 478; Hot Oil Act, 15 U.S.C. § 715.

Where there is federal adoption or "borrowing" of state law to implement or promote the purposes of a federal statutory scheme, state interpretations of "borrowed" state law have been held binding on the federal government in a number of cases. *Gauley Mountain Coal Co. v. Bureau of Mines,* 224 F.2d 887 (4th Cir. 1955); *RFC v. Beaver County,* 328 U.S. 204 (1946).

It is only where the state law or regulation (and the state interpretation) is inconsistent with the federal statutory scheme or policy or where the state law would violate the Constitution, that courts have not upheld state laws or have exempted federal enclaves from the application of state laws. *Air Terminal Services Inc. v. Rentzel,* 81 F.Supp. 611 (ED Va, 1949); *Smayda v. United States,* 352 F.2d 251 (9th Cir. 1965); *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 595 (1973).

In this case, however, the state laws and regulations (permit requirements) clearly are consistent with the federal statutory scheme and policy of controlling and abating air pollution everywhere in the nation, including pollution emitted from federal enclaves. In placing major emphasis on state implementation plans, Congress clearly intended that state laws, regulations and requirements which implement the objectives of a control strategy and the purposes of the Clean Air Act apply equally to federal enclaves and facilities. The fact that Section 118 of the Clean Air Act specifically singles out federal facilities for equal treatment only adds weight to our view that state laws and regulations adopted as federal law by the federal government to implement congressional statutes are binding on federal enclaves and stationary sources of pollution.

Amici curiae submit that the proper test in reviewing the applicability of state laws and regulations affecting federal stationary sources contained in approved implementation plans is to determine 1) whether such state laws and regulations have been properly reviewed and approved by EPA, 2) whether such state laws and regulations aid in the attainment and maintenance of the national ambient air quality standards; and 3) whether upholding applicability of state laws and regulations to federal stationary sources or enclaves *would prevent* attainment and maintenance of the national air quality standards by the congressionally prescribed times, would frustrate the purposes of the Clean Air Act or would violate the Constitution.[13] Amici curiae submit that using this test, the application of Kentucky's permit requirements (approved by EPA) to federal enclaves and stationary sources of air pollution is clearly supportable.

D. Permit Requirements Do Not Constitute a Significant Additional Burden on Federal Facilities.

It is not contested that federal facilities must, at a minimum, comply with federal, state, interstate and local air pollution control *standards* and limitations. As we have previously argued, the permit requirement is essentially a means to insure compliance with the standards. This is particularly true in the case of the permit programs [National Pollutant Discharge Elimination System or NPDES] required to be implemented by Section 402 of The Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C. Section 1342.

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[13]See Luneburg, *Federal-State Interaction Under The Clean Air Amendments of 1970,* 14 Boston College Ind. & Com., L.R. 637, 643-46 (1973).

Therefore "[i]f a federal agency must comply with local substantive law and local permits must issue as long as such substantive law is obeyed, then the effect of the permit procedure solely is to enable the local government to determine if the agency is indeed obeying the law. In this sense the permit procedure imposes no additional burden on the federal agency since it is already legally obligated to do all those things which will entitle it to a permit." Comment, *Local Control of Pollution From Federal Facilities,* 11 San Diego L. Rev. 972, 987 (1974).

The fact that state and local permit requirements carry the power to stop the operation or construction of federal air pollution sources (by denyng or revoking permits), does not mean that a significant additional burden has been imposed on the federal facilities. The denial or revocation of a permit to operate or construct can only be exercised in order to achieve or maintain federal, state, interstate and local air quality standards which federal facilities are concededly required to obey. The only burden imposed on the federal facility is, therefore, the burden of seeking administrative or judicial relief from permit revocations or denials it believes are unnecessary to achieve and maintain state and national air quality standards.

In any event, it is quite apparent that Congress has not granted state and local governments total control over federal facilities through Section 118. Section 118 expressly gives the President authority to exempt individual federal facilities from federal, state and local "requirements."

For those reasons, amici curiae believe that Congress has affirmatively declared its intent to subject federal facilities to state and local permit requirements and has consented to enforcement actions.

III

The Complementary Nature of the Clean Air Act and the Water Pollution Control Act, and the Near Identity in Both Acts of Provisions Controlling Federal Facilities, Requires a Uniform Interpretation in Both Acts That the Term "Requirements" Encompass Permit Systems in Approved Pollution Control Plans.

Amici curiae submit that in this case, the "strong structural and terminological similarities between the Clean Air Act and the 1972 Water Pollution Control Act Amendments"[14] ("Water Act"), show that the Court should refer to the Water Act Amendments as an aid to interpreting Section 118 of the Clean Air Act. *Mattz v. Arnett*, 412 U.S. 481, 505, n. 25 (1973). In fact the issue raised by the case before this Court cannot be resolved definitively without considering the same issue arising under the Water Act.[15] Moreover, the provisions of the Water Act Amendments compel the conclusion that with respect to both Acts, Congress intended operators of federal facilities to comply fully with federal or state requirements respecting control and abatement of pollution including permit provisions of federally approved state plans. The two Acts manifest a parallel Congressional purpose, structure and design, and in pertinent parts, use the same language.

The Congressional purpose underlying each Act is substantially identical. In enacting the Water Act, Con-

[14]*California v. EPA*, ... F.2d ...., 7 E.R.C. 1667 (9th Cir. 1975).

[15]*Compare Alabama v. Seeber, supra,* to *California v. EPA, supra.*

gress declared that its objective is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." (§ 101(a); 33 U.S.C. § 1251(a).) Similarly, with respect to the Clean Air Act, Congress declared that its objective is "to protect and enhance the quality of the Nation's air resources . . ." (§ 101 (b)(1); 42 U.S.C. § 1857.)

The structure and design of the Acts also is substantially the same. In each Act, Congress recognized that state and local governments have the primary responsibility for preventing and controlling pollution. Section 101(b) of the Water Act declares in part that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states to prevent, reduce and eliminate pollution." (42 U.S.C. § 1251(b).) Section 101(a)(3) of the Clean Air Act declares "that the prevention and control of air pollution at its source is the primary responsibility of states and local governments." (42 U.S.C. § 1857(a)(3).) Also in each Act, Congress intended that the states should develop and with the Administrator's approval, administer clean air implementation plans (42 U.S.C. § 1857c-5) or water pollution control programs (33 U.S.C. § 1342(1) to assure compliance with air and water standards established by the respective Acts. And in each Act, Congress established timetables within which the states must achieve specified standards of water and air quality. Water Act, § 301 (a); Clean Air Act § 110.)

Finally, Congress used precisely the same words in each Act to insure that federal facilities would be bound to comply with *all* pollution control and abatement requirements in federally approved state implementation plans. Both Section 118 of the Clean Air Act and Section 313 of the Water Act require that operators of federal facilities:

> ". . . shall comply with Federal, State interstate and local requirements respecting control and abatement of [air] pollution to the same extent that any person is subject to such requirements . . ." 42 U.S. § 1857f; 33 U.S.C. § 1323.[16]

Additionally, Section 118 of the Clean Air Act and Section 313 of the Water Act both provide that ". . . [T]he

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[16]The Noise Control Act of 1972 (42 U.S.C. § 4901 *et seq.*), while different in some respects from the Clean Air and Water Acts, contains language virtually identical to that in Section 118 of the Clean Air Act and Section 313 of the Water Act respecting compliance by federal facilities with state and local noise requirements. The Noise Control Act of 1972 provides that operators of federal facilities ". . . shall comply with Federal, State, interstate and local *requirements* respecting control and abatement of environmental noise to the same extent that any person is subject to such *requirements*". 42 U.S.C. § 4903(b) (emphasis added). In addition, the Noise Control Act of 1972 expressly allows state and local governments to ". . . establish and enforce controls on environmental noise (or one or more sources thereof) through the *licensing, regulation,* or restriction of the use, operation or movement of any product or combination of products" 42 U.S.C. § 4905 (emphasis added). This demonstrates that the use of the term "requirements" in the Noise Act includes "licensing" and permit systems or programs.

The near identity of the Noise Act's provision governing compliance by federal facilities with state and local "requirements", with the parallel provisions in the Clean Air and Water Acts, is further support for a uniform interpretation that intended federal facilities to comply with state and local permit requirements respecting the control and abatement of (1) air pollution, (2) water pollution and (3) noise pollution.

President may exempt any [effluent or emission] source of any department, agency, or instrumentality in the executive branch from compliance with any such requirements if he determines it to be in the paramount interest of the United States to do so. . . ."

Section 313 of the Water Pollution Control Act (like Section 118 of the Clean Air Act and for all the reasons set forth, *supra,* with respect to the Clean Air Act) requires operators of federal facilities to comply fully with state "programs" respecting control and abatement of pollution including state permit programs. Significantly, however, the Water Pollution Control Act, for one additional reason, more strongly manifests the intent of Congress that operators of federal facilities comply fully with state permit regulations.

Specifically, Section 313 provides that operators of federal facilities shall comply with federal and state "requirements . . . , including the payment of reasonable service charges." The phrase regarding service charges clearly refers to those service "charges incident to state permit programs." *California v. EPA,* .... F.2d ...., 7 E.R.C. 1667, 1671-1672 (9th Cir. 1975). No other meaning is possible, for as the Ninth Circuit pointed out in *California v. EPA, supra,* if the word "requirements" as it is used in Section 313 were interpreted to refer only to substantive effluent standards and limitations, then the phrase "including the payment of reasonable service charges" would be a *non sequitur.*[17]

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[17]In *California v. EPA, supra,* 7 E.R.C. 1667, 1671, respondents counter this by contending that "reasonable service charges"

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There is another parallel between the Clean Air Act and the Water Pollution Control Act. Section 116 of the Clean Air Act, as we have argued, distinguishes between "standard or limitation respecting emissions of air pollutants" and "any requirement respecting control or abatement of pollution", by separating the two phrases with the disjunctive "or". Section 510 of the Water Pollution Control Act uses the identical structure and language in making the same distinction except that "discharges of pollutants" is substituted for "emissions of air pollutants." Clearly this shows that when Congress used the phrase "any requirement respecting control or abatement of pollution" in Sections 116 and 118 of the Clean Air Act and in Sections 313 and 510 of the Water Pollution Control Act, Congress intended "any requirement" to be broader than "standard or limitation," to include permit systems, programs or procedures.

The Water Pollution Control Act Amendments of 1972 make explicit references to permits and permit programs in Sections 402 and 505. In Section 402, the Water Pollution Control Act sets up the National Pollutant Discharge Elimination System or NPDES which expressly requires a permit program for assuring compliance with water quality standards. Section 505

refers to those for state and local sewage treatment hookups. However, such an interpretation would render the phrase superfluous for no one has ever suggested seriously, that "subordinate governmental bodies must supply public utility services to federal agencies free of normal user charges. Hence, there would be no need for Congress to explicitly direct federal agencies to pay their full share of the municipal sewer system costs." *California v. EPA, supra,* 7 E.R.C. 1667, 1671. On the other hand, reasonable service charges, incident to a permit program, might be deemed sufficiently in the nature of a tax to require Congressional consent to become "properly payable federal obligations." *California v. EPA, supra,* 7 E.R.C. 1667, 1672.

authorizes citizen suits to enforce the Water Pollution Control Act against any person including the United States. Section 505(f) defines "effluent standard or limitation" to mean, among other things:

> " . . . a *permit or condition* thereof issued under section 402 of this Act, which is in effect under this Act (*including a requirement applicable by reason of section 313 of this Act*)." 33 U.S.C. § 1365. (Emphasis added.)

Section 505(f) in itself strongly suggests that Section 313 of the Water Act, which mandates operators of federal facilities to comply with federal, state and local pollution control requirements, must be interpreted to include mandatory compliance with state and local permit programs.[18] At a minimum, the express federal consent to citizen suits to enforce *permit* requirements in Section 505 clearly negates the reasoning of the Sixth Circuit in *Kentucky v. Ruckelshaus,* which justified exemption of federal facilities from state suits to enforce air pollution control permit requirements on the ground that the Clean Air Act's citizen suit provision (Section 304) does not expressly authorize permit enforcement suits.[19] The fact that the Clean Air Act does not expressly refer to permit systems or programs does not mean that operators of federal facilities must comply with state water pollution permit requirements but not state air pollution permit requirements. It would be plainly irrational to attribute different meanings to the federal compliance provisions of the Clean Air and

[18]Comment, *Local Control of Pollution from Federal Facilities,* 11 San Diego L.R. 972, 992 (1974).

[19]*Kentucky v. Ruckelshaus,* 497 F.2d 1172, 1176 (6th Cir. 1974).

Water Pollution Control Acts when these provisions (§§ 118 and 313) contain identical wording.[20]

In summary, the remarkable similarity and near identity of certain parallel provisions of the Clean Air and Water Pollution Control Acts require that, at least the parallel provisions be uniformly interpreted. Section 118 of the Clean Air Act and Section 313 of the Water Pollution Control Act being parallel provisions and nearly identically worded, admit no other rational interpretation other than mandating operators of federal facilities to comply with *federal, state* and *local* air and water pollution control permit requirements.

Conclusion.

In view of the plain language used by Congress in Section 118, ordering operators of federal facilities to comply with federal, state and local air pollution control "requirements," it is surprising that so many federal facilities have resisted compliance with state and local permit requirements which are essential for the states to fulfill their responsibilities to enforce implementation plans required by the Clean Air Act. There is nothing in either the legislative history of Section 118 or in the statutory language which supports the so-called substance procedure distinction urged by Respondents. On the contrary, resort to familiar rules of statutory construction compels the conclusion that the term "requirements" used in context includes *permit* requirements. Parallel provisions in the Water Pollution Control Act of 1972 and the strong similarity between the two statutes help clarify our position that operators of

[20]Comment, *Local Control of Pollution from Federal Facilities,* 11 San Diego L.R. 972, 992 (1974).

federal facilities must comply with both water and air pollution control permit requirements.

If federal facilities are exempted from state and local permit requirements, local and state efforts to control and abate air and water pollution will be set back.

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